

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 01-455-A
)	
ZACARIAS MOUSSAOUI)	

RESPONSE TO DEFENDANT MOUSSAOUI'S DISCOVERY MOTION
DIRECTED TO STANDBY COUNSEL

Mr. Moussaoui by motion seeks documents from defense counsel, most of which he should already have on CD-ROM (although it might take him a year to find them). Mr. Moussaoui's motion (Docket #282)¹ should instead be considered as a Discovery/*Brady* motion and be directed to the government for response.

**I. PRINTING OUT DISCOVERY MATERIAL CONTAINED ON CD-ROMs
PROVIDED DURING THE COURSE OF DISCOVERY IS COMPLETELY
IMPRACTICAL**

Delivering all discovery material provided to appointed counsel in printed format to Mr. Moussaoui at the Alexandria Jail as Mr. Moussaoui requests would leave no room for Mr. Moussaoui in his cell or in the cell where he has his computer and might even consume the entire jail. We have been given hundreds of thousands of documents in CD-ROM format ("disks"), a format that was used specifically because of the amount of the paper equivalent. To print out all of the information on these disks would produce a staggering and unmanageable amount of paper.

Since Mr. Moussaoui's motion was filed we have delivered an additional 952 CD-ROMS (approximately) to Mr. Moussaoui to supplement hundreds that he already has. This results in him having all of the document discovery, except classified discovery, that has been produced by the

¹ Motion to be handed all print out of [sic] death appointed lawyer material [sic] and Federal Public Defender of defense production and material before June 13, 2002.

government to date. Many (most) of the documents on these disks (in our view) have absolutely nothing to do with the case. The problem, of course, is the time-consuming task of distilling from the mass those that do have something to do with this case. Mr. Moussaoui, with the printer he recently requested, will be able to view the documents on the disks on his computer and print out only those which are of interest to him.

Meanwhile, standby counsel are in the process of undertaking the same task in parallel, reviewing disks received from the government, most of which were delivered during the months of June and early July, and are endeavoring to sort and categorize documents using a litigation support system rather than printing them out in order to avoid being drowned in paper. Accordingly, standby counsel do not have the “print outs” Mr. Moussaoui requests.

II. THIS COURT SHOULD EXERCISE ITS BROAD DISCRETION TO CONTROL DISCOVERY

The discovery material when delivered was not organized by subject matter category, such as the categories described by Mr. Moussaoui in his motion. The government has declined to do this. The discovery is typically organized, to the extent you can say it is organized, by FBI Field Office from which the material was retrieved. The material from a particular office appears to be all of the material from that office related to September 11, 2001 and does not appear to be organized by subject matter nor culled to eliminate the obviously irrelevant.² Indices in some instances have been provided and are helpful — in other instances there are no indices. Either way, the government has not identified what bits of the discovery were produced as Rule 16 material, what bits will be relied

² *E.g.*, the inventory of an abandoned hotel room might include a half dozen pictures of the Bible. The government, unwilling to provide documents by subject matter categories, did offer to cull out 302's falling into generic categories the defense might define as informational categories of 302's it did not want. We were unable to describe such abstract generic categories.

on at trial, what bits are produced as *Brady* or where *Brady* might be found among the mass of documents, etc. To distinguish these bits from the overwhelming majority of the material which falls into the category of “none of the above” is an overwhelming task which requires the defense to look at everything, translate hundreds of documents and tapes in foreign languages, forensically examine hundreds of hard drives, and review more than 584 videotapes.³ Some contain nothing more than “Popeye” cartoons, but they all have to be reviewed to be sure that there is not something more than “Popeye” on them). Tapes of ATM machine security cameras have to be watched frame by frame.

The problem created by the massive amounts of discovery and the inadequacy of the time to review it between now and trial must be addressed by the Court. The Court has discretion to regulate trial discovery as other courts have done when discovery was voluminous, even though nowhere near as voluminous as what is faced here. *See, e.g., United States v. McDade*, U.S. Dist. LEXIS 19254 (E.D. Pa. 1992) (court directed the government to limit haystack size by identifying tapes it did not intend to use at trial three months in advance of trial); *United States v. Poindexter*, 727 F. Supp. 1470 (D.D.C. 1989) (court directed prosecutors to identify documents on which the government will rely at trial and those as to which witnesses will refer); *United States v. Turkish*, 458 F. Supp. 874 (S.D.N.Y. 1978) (identify all case-in-chief documents).

Exercising this discretion, the Court should require the government to (a) identify the discovery materials it will not be relying on at trial well in advance of trial so that the defense will

³ The government has recently provided some guidance with respect to which hard drives are of greater significance. However, an example of just one (1) of approximately 1200 CD-ROMs delivered to date containing non-classified information is attached hereto (disk labeled MSFB_001) so that the Court can directly see the time-consuming nature of the discovery review. As the Court will see, there are 4,791 images on this disk. Each image needs to be separately opened and closed. Ferreting out the pertinent documents is an extremely time-consuming process and can only be done by persons with knowledge of the case. For example, on this disk alone, images 51 and 52 contain the e-mail receipt for 9/11 hijacker Khalid Almidhori’s purchase of tickets for his 9/11 flight. As far as we are concerned, the vast majority of the remaining images are not relevant to the defense. (We are not providing the attachment to the government since they already have the original.)

not have to waste time reviewing them and (b) identify by discovery number (disk, bates or other identifying data) those documents which fall into any one or more of the categories identified by Mr. Moussaoui in docket #282 as well as all documents related to Mr. Moussaoui's "Motion to See What Scam is About" (which should include all financial information on Ramzi Bin al Shibh). The government also should provide translations of material in foreign languages where it has such translations of tapes and documents produced.

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Defendant Moussaoui's Discovery Motion Directed to Standby Counsel was served via facsimile and by hand upon AUSA Robert A. Spencer, AUSA David J. Novak, and AUSA Kenneth M. Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 10th day of July, 2002.

/S/

Frank W. Dunham, Jr.